

No. 92-1964

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HEALTH CARE & RETIREMENT CORPORATION
OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Respondent Health Care and Retirement Corporation of America is a wholly owned subsidiary of Health Care and Retirement Corporation. Respondent does not have any non-wholly owned subsidiaries.

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NATIONAL LABOR RELATIONS BOARD,
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STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

Respondent Health Care and Retirement Corporation of America ("HCR") respectfully prays that this Court deny the writ of certiorari and dismiss the petition.

STATEMENT OF THE CASE

This case arises out of the discipline and/or discharge of four nurses employed by HCR at a nursing home in Urbana, Ohio. The General Counsel of the National Labor Relations Board ("the Board") claimed that the disciplinary action violated §8(a)(1) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(a)(1). Respondent defended on the grounds that the nurses were supervisors and thus not entitled to the protection of the Act and that the disciplinary action was taken for legitimate reasons, not as a result of any protected activity.

After eight days of hearing, an ALJ concluded that "in common parlance" the nurses are supervisors because they give orders to the nurses' aides which the aides follow and because the nurses are in charge of a wing of the facility. The ALJ determined that the nurses were nonetheless employees, not supervisors, because the Board's definition of supervisor "is different from Webster's." (App. 48a). The ALJ also found that Respondent did not discharge the nurses because they engaged in protected activities.¹ Both parties filed exceptions to the ALJ's decision.

The Board upheld, without analysis, the ALJ's conclusion that the nurses are employees. Rejecting the ALJ's findings of fact and credibility determinations, the Board further concluded that Respondent violated §8(a)(1) of the Act by discharging and/or disciplining the nurses.

¹ The ALJ also concluded that Respondent's issuance of written warnings to three nurses for improper documentation, improper assignment and excessive absences did not violate the Act. He did determine, however, that Respondent's issuance of written warnings to two nurses for missing an in-service violated the Act.

The Sixth Circuit Court of Appeals vacated the Board's order, concluding that the nurses were supervisors within the meaning of the Act because they assigned work to and directed the work of subordinate employees, i.e., nurses' aides. The Court did not reach the issue of whether the nurses performed any of the other functions listed in §2(11) of the Act.²

² Having determined that the nurses were supervisors, the Court also did not address the propriety of the Board's rejection of the ALJ's conclusion that the nurses were not disciplined or discharged as a result of any protected activities.

REASONS FOR DENYING THE WRIT

I. This Is Not An Appropriate Case To Address The Issues Presented.

Petitioner contends that this case is appropriate for review because the Sixth Circuit rejected Petitioner's position that the definition of "supervisor" in Section 2(11) of the Act is narrowed when applied to health care employees. Respondent agrees that the Board and the Sixth Circuit apply the statutory standard differently. Respondent also recognizes that other circuit courts of appeals, presented with different facts, have deferred to the Board's approach. The purported conflict can not, however, be resolved in this case.

The issue upon which the Board and the Sixth Circuit differ is whether nurses who meet the statutory definition of supervisor because they assign work to and direct the work of subordinate employees are nonetheless disqualified from being supervisors because the activity they supervise involves patient care. Because that issue was not dispositive in this case, *i.e.*, the nurses also performed other supervisory functions listed in the statute,³ this case does not adequately present the issues asserted and the petition should be denied. *Ramsey v. New York*, 440 U.S. 444 (1979); *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971). See *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969).

The Act defines a "supervisor" as one who has authority, in the interest of the employer to assign, reward or discipline other employees, responsibly to

³ The Board applies its "patient care" exception only when nurses' supervisory status is based upon their assignment and direction of subordinates' work. The Board concedes that nurses with the authority to reward or discipline subordinates, or effectively to recommend the same, are supervisors.

direct them, or "effectively to recommend such actions." 29 U.S.C. §152(11). The Board concedes that respondent's nurses assign work to and direct the work of the nurses' aides. The Board, however, ignores the fact that the nurses also play a crucial role in the disciplinary and evaluative processes in the facility.⁴

Respondent's nurses routinely counsel aides when they observe inappropriate behavior or poor performance on their shift (App. 43a). When they deem it appropriate, the nurses also complete written counseling forms or written warning notices respecting the aides' performance. These notices are maintained in the employee's personnel file and can be relied upon for additional discipline in the future. The nurses also report to management on problems with the aides' work and may recommend a penalty to the director of nurses or the facility's administrator. The ALJ recognized that these reports can "have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge." (App. 44a).

The nurses also complete both probationary and annual evaluations to assess the performance of and give progress reports to employees. In completing the evaluations, the nurses rely on their daily observation of an aide's work performance and their own judgment

⁴ The Board also ignores the secondary criteria it has identified as important in determining supervisory status, including job descriptions and ratio of employees to supervisors. The nurses' job description indicates that they are responsible for overall management and supervision of their units. They are specifically required to assign and direct the aides' work and to appraise the quality and quantity of the aides' performance. Moreover, if the nurses are not supervisors, the ratio of employees to supervisors in the nursing department is 30 to 1. Even the Board must concede that such a ratio is unreasonable.

regarding the quality of the aide's work. These performance evaluations become a part of the employee's permanent personnel file.⁵

The nurses at Heartland of Urbana clearly have the authority "effectively to recommend" rewards and discipline. Although they may not actually calculate raises or discharge employees, they are responsible for initiating and following through both the evaluative and disciplinary processes and their written statements are part of the employees' record.

The nurses' disciplinary and evaluative functions alone render them supervisors under the Act. The Court need not decide, therefore, whether their assignment and direction duties are sufficient to confer supervisory status. Under these circumstances, the questions presented by the petition are "purely artificial and hypothetical" and would result in the Court rendering an advisory opinion. *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969).⁶

⁵ Respondent presented evidence at the hearing that the nurses complete all portions of the written evaluation form, including the section entitled "Overall Evaluation". The alleged discriminator testified, however, that they were instructed not to complete that portion of the form (App. 45a).

⁶ The issues the Board raises herein are also raised in another Petition for Writ of Certiorari pending in this Court. See *Visiting Homemaker and House Services, Inc. v. National Labor Relations Board*, Case No. 92-1799, Petition for Writ of Certiorari filed May 11, 1993. The *Homemaker* case may be a more appropriate vehicle for addressing the issues the Board raises.

II. The Sixth Circuit Correctly Concluded That There Is No Exception In The Act For Health Care Workers.

Under the Act a supervisor is "any individual having authority, in the interest of the employer, to . . . transfer, . . . assign, other employees or responsibly to direct them . . ." 29 U.S.C. §152(11) (emphasis added). The Board has itself recognized that only one of the powers listed in §2(11) need be present to establish supervisory status. *Phelps Community Medical Center*, 295 NLRB 486 (1989). The Board nevertheless takes the position that nurses who assign work to and direct the work of aides or other subordinates cannot, without more, be statutory supervisors. Indeed, the Board appears to take the position in its petition that all professionals are exempt from supervisory status.⁷

According to the Board, when nurses direct the work of nurses' aides or other subordinates, they act in accordance with professional norms, and thus not "in the interest of the employer." The Board made a similar argument respecting managerial employees in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). This Court recognized in *Yeshiva* the tension between the Act's exclusion of managerial employees and its inclusion of professionals, "since most professionals in managerial positions continue to draw on their special skills and training." That same tension exists with respect to supervisory employees. That tension cannot be resolved,

⁷ This is a new argument; Petitioner did not even raise in the Court of Appeals the interplay between the Act's coverage of professional employees and its exclusion of supervisors.

however, by excluding from supervisory status all those who act in accordance with professional norms. *Yeshiva*, 444 U.S. at 687.⁹

The Board also contends that nurses who supervise aides act in the interest of the patient rather than in the interest of the employer. In *Yeshiva*, the Board argued that in formulating and making policy for the university, faculty members acted primarily in their own interest, not the interest of their employer. This Court recognized that the faculty's professional interests could not be separated from those of the institution. 444 U.S. at 688. As the Court noted, "the 'business' of a university is education," and "the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal." *Id.* The Sixth Circuit has made similar observations with respect to nurses:

Contrary to the assertions of the Board, nurses with [supervisory] responsibility are not disqualified from being supervisors simply because their duties largely involve "mere patient care." Patient care, or "mere patient care", in the Board's phraseology, is the business of a nursing home.

NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 976 (6th Cir. 1987).

⁹ Contrary to Petitioner's claim, this Court's favorable citation in *Yeshiva to Doctor's Hospital of Modesto, Inc.*, 183 NLRB 950, 951-52 (1970) *en'd* 489 F.2d 772 (9th Cir. 1973) does not evidence this Court's approval of the Board's "mere patient care" distinction. The *Modesto* case involved a hospital, not a nursing home. Moreover, there were several layers of supervisors in the nursing department in *Modesto*. Those intermediate levels do not exist at Respondent's facility.

Congress recognized, in excluding supervisors from coverage under the Act, that employers require the undistracted allegiance of employees in key positions. *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 806 (1974). Respondent's business operates 24 hours a day, 365 days per year. Its nurses are the only supervisory employees at the facility for a large part of every day and all weekend.¹⁰ To ensure that its business is run properly, Respondent has vested its nurses with supervisory authority, and relies upon them to exercise it.

Respondent does not suggest that nurses in nursing homes are always supervisors within the meaning of the Act; each case must be decided on its facts.¹⁰ The Board's rule, however, would exclude all but a few health care workers from supervisory status. This standard is simply not consistent with the Act and is not entitled to judicial deference. *Yeshiva*, 444 U.S. at 691; *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978).

¹⁰ The ALJ was "greatly troubled" by the fact that if the nurses are not considered supervisors, there is no one acting as a supervisor in the evening and on weekends, and there is a 30:1 ratio of employees to supervisors in the nursing department (App. 46a-48a).

¹¹ The determination of supervisory status is fact intensive and the cases cited by the Board are distinguishable on their facts from this case.

III. Because The Allocation Of The Burden Of Proof Was Not Determinative In This Case, It Is Not An Appropriate Basis For Review.

The Board concedes that the allocation of the burden of proof was not determinative in this case. Petition for Certiorari at 20, n.13. Although the Board concluded that Respondent had the burden of proving supervisory status, the Board states that "the preponderance of the evidence establishes that the nurses are employees." (App. 13a).

The Sixth Circuit, while holding that the Board had the burden of proof on this issue, concluded that "there is substantial evidence to support HCR's claim that the LPN's are, in fact, supervisors." (App. 9a).

Under the facts of this case, the issue of who bears the burden of proof is not outcome determinative. This case is not, therefore, appropriate for review of the burden of proof issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied because this case does not present appropriate facts to address the questions presented.

Respectfully submitted,

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